In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-69.

ROBERT A. PANORA,
REGISTRAR OF MOTOR VEHICLES
OF THE COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Appellant's Supplemental Brief.

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Introduction.

The appellant Massachusetts Registrar of Motor Vehicles files the present Supplemental Brief in response to the Court's order of February 21, 1978. That order permitted the parties to file such briefs on the subject of the further

opinion of the district court rendered on October 6, 1977, and now reported at 438 F. Supp. 1157. In its second opinion the district court addressed the effect of *Dixon* v. *Love*, 431 U.S. 105 (1977), upon its original decision to invalidate the Massachusetts implied consent or "breathalyzer" statute, and denied the appellant Registrar's motion to stay and to modify judgment in light of the intervening *Love* decision. In the belief that the district court's second opinion is a further misapplication of due process doctrine governing the entitlement to a prior hearing in the administration of motor vehicle implied consent laws,[1] the Massachusetts Registrar submits the following argument.

Argument.

I. By Due Process Standards, The Massachusetts Implied Consent Statute Compares Favorably With The Illinois Habitual Offender Law Upheld In Dixon v. Love.

The present appeal shares strong common features with *Dixon* v. *Love*. There, a driver challenged an Illinois statutory program for the summary suspension or revocation of a driver's license based solely upon the content of official records. The Illinois system did not extend a full administrative hearing until after suspension or revocation.

[1] As in the original decision, the three-judge panel divided by 2-1 vote in its second opinion. Circuit Judge Cambell filed a further dissenting opinion. 438 F. Supp. 1157, 1161-1165. A full procedural chronology of the present appeal appears in the earlier filed Appellant's (1) Response to Appellee's Motion to Vacate, and (2) Motion for Summary Reversal, at pp. 1-3.

The Court found that it satisfied due process. Here the challenged statute similarly provides for suspension upon the basis of official records and similarly affords an administrative hearing after suspension. A corresponding decision in favor of its constitutionality is in order.

The due process claim in *Love* involved the Illinois Driver Licensing Laws. The contested provision, Ill. Rev. St. c. 95 ½, § 6-206, directed the Secretary of State to suspend or revoke a driving permit "without a preliminary hearing upon a showing by his records or other sufficient evidence" that a driver's conduct fell into any one of eighteen categories enumerated in the statute. Ill. Rev. St. c. 95 ½, § 6-206(a). The Secretary under his administrative authority adopted regulations further defining conduct warranting a summary suspension or revocation by his office. Thus, where the statute conferred discretion upon the Secretary to suspend or revoke a driving permit of a licensee repeatedly convicted of moving traffic violations, § 6-206(a)(3), the Secretary adopted a regulation mandating revocation of a license suspended three times within a ten-year period.

Under the same statutory scheme, once a license had been suspended or revoked the licensee could request a full administrative hearing. Within twenty days of receiving a written request for a hearing, the Secretary had to schedule a hearing date. Though the hearing need not take place within the same twenty days, it had to be held "as early as practical." Section 2-118(a). Also, where a license had been suspended or revoked, the driver could obtain either a restricted permit for commercial use or a restricted permit to relieve undue hardship. These provisions were not self-executing and required the applicant to carry the burden of establishing eligibility through either affidavit or an administrative hearing. Section 6-206(c)(2), (3).

In *Love* a truck driver's records at the Secretary of State's office showed that his license had been suspended three times within a ten-year period. The Secretary, pursuant to his regulations, summarily suspended the truck driver's license. The truck driver then challenged not the adequacy of the post-suspension administrative hearing, but only its timing. Such a hearing, the licensee claimed, should occur prior to any suspension or revocation.

The Court rejected this claim by application of the standards set out in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In the present case the challenged statute, Mass. Gen. Laws c. 90, § 24(1)(f), directs the Registrar to suspend for ninety days an individual's license to operate a motor vehicle when he receives a report that the individual refused to submit to a chemical analysis of his breath. The report must include a statement of the driver's arrest for operating a motor vehicle under the influence of alcohol, of the observations by the police officer leading to arrest, and of the driver's refusal of the chemical analysis of his breath

after notice that refusal would result in the suspension of his license for ninety days. The act of refusal is required to be witnessed by an observer and the whole report is sworn to and signed under the pains and penalties of perjury by the arresting officer.

Pursuant to Mass. Gen. Laws c. 90, § 24(1)(g), when a person whose license has been suspended by the Registrar for refusal to submit to a chemical test or analysis of his breath so requests, the Registrar must grant him a hearing on the suspension. The hearing is available on the same day on which the licensee surrenders his license.[2] Despite the immediate availability of a hearing upon suspension, the plaintiff below, as did the truck driver in *Love*, claims that such a hearing should be held prior to the Registrar's action. Consequently, we measure the Massachusetts law by the criteria of the *Love* decision.

II. The Private Interest In A Driver's License Is The Same Under Both The Illinois And Massachusetts Laws.

As to the nature of the private interest involved in a driver's license, this Court noted in *Love* that, while a licensee could not be made entirely whole if his license were to be reinstated after a full administrative hearing, a driver's license is not necessarily so vital that it is essential to the very subsistence of the licensee.[3] Furthermore, since the Illinois statute made special provision for hardship cases

[2]The district court majority acknowledged the availability of this "same day" hearing, but concluded that it feasibly reached only obvious or clerical errors and served inadequately for deeper factual disputes. 438 F. Supp. 1157, 1159-1160 n. 2. They infer the likely delay of a fully adequate hearing to a later point in the suspension when fuller evidence will have been gathered and can be presented. *Id.*, 1159.

[3]431 U.S. 105, 113 (1977).

where the license to operate a motor vehicle might be necessary to maintain a livelihood, the Court concluded that something less than an evidentiary hearing was required prior to the driver's license.[4]

The Massachusetts statutory scheme provides anyone, no matter how essential a part the license to operate a motor vehicle may play in his or her daily life, with the opportunity to obtain an immediate hearing on the issue of suspension. Though a full administrative hearing may require a short time to summon any necessary witnesses, the hearing begins upon the very day of its request. Such a procedure is not only more accommodating to the licensee than the Illinois scheme but expeditious as well. In Illinois a hearing, if requested, need not be *scheduled* for up to twenty days after receipt of such a request and even then need only be set for a date as "early as practical." Section 2-118(a). Also, as noted above, the same statutory scheme placed the burden upon the licensee to establish his eligibility for the special hardship provisions which may result in the issuance of a limited permit to operate a motor vehicle after the suspension or revocation has taken place.

Here the district court claimed additional weight for the private interest at stake. It reasoned that since Massachusetts makes no provision for hardship relief, as does Illinois, the potential for economic hardship is far greater in Massachusetts than in Illinois.[5] However, the court below failed to recognize that the hardship provisions are not available until after the suspension or revocation and that then the burden rests upon the licensee by way of a hearing or affidavit to establish eligibility. Section 6-206(c)(2), (3).

[4] *Id.*

[5] See 438 F. Supp. 1157, 1159. Compare *Dixon* v. *Love*, 431 U.S. 105, 114 n. 10.

As the Circuit Judge pointed out in his dissent, these procedures may take some time.[6] Even without hardship provisions, the Massachusetts opportunity for a licensee to obtain an immediate hearing to contest the suspension is equally effective, if not more so, for the cure of any hardship possible from erroneous suspension.

Finally, we question the strength of a distinction built upon the exceptional hardship case of the professional truck, bus, or taxi driver, rather than upon the usual suspension of an uncooperative intoxicated driver confronting inconvenience rather than hardship. Nothing in the Massachusetts law prevents the sensible expedition of hearings for the special hardship case. More importantly, however, due process doctrine should turn on the general, and not the unusual, case. *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976). The district court's rationale on this point should not remove the case from the control of the *Love* decision.

III. In Massachusetts The Risk Of An Erroneous Suspension Of The Driver's License Is Minimized By Safeguards.

As for the second critical factor, the analysis of the risk of erroneous deprivation by this Court in *Dixon* v. *Love* reduced to a question whether additional procedural safeguards would be of significant value in reducing the number of erroneous deprivations.[7] There this Court noted that while the risk of clerical error existed in the records of the Secretary, such errors could readily be brought to the

[6] 438 F. Supp. 1157, 1163.

[7] 431 U.S. 105, 114.

Secretary's attention. Further assurance against error arose from the adjudicated convictions themselves constituting the records. In these circumstances a pre-suspension hearing would have little meaning. It would merely give the licensee the opportunity to plead for leniency and would not significantly reduce the risk of erroneous deprivations.

Under the Massachusetts statute, the addition of a pre-suspension hearing would have a similar minimal value. The action of the Registrar is based on an official record, namely, the report of refusal. The filing of the report is triggered by the occurrence of a simple and readily observable fact, the refusal to submit to a chemical test. This fact is attested to under the pains and penalties of perjury by the arresting police officer and is also witnessed by another person. This report in the vast majority of cases will be reliable. While a clerical error of some type may occur, nothing prevents the immediate attention of the Registrar to such an error, especially at the "same day" hearing.

In this branch of its discussion, the district court stated that a pre-suspension hearing need not take the form of an evidentiary hearing, and that it need only afford the licensee a chance to alert the Registrar to the possibility that a suspension is unwarranted and would be unjust.[8] The statutorily required officer's affidavit and additional witness of the refusal already serve the purpose of factual accuracy. A further requisite pre-suspension hearing would more likely become the occasion for delay, angle-playing, and leniency pleas.[9]

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[8]438 F. Supp. 1157, 1159-1160 n. 2.

[9]The district court focused upon the driver's claim of his willingness to take the test and upon an ambiguous state court disposition of that claim. 438 F. Supp. 1157, 1161. Those circumstances are explicable as the driver's belated change of mind after a stay at the station house and his claim that the police did not respond to his delayed willingness. We doubt that a constitutional entitlement to pre-suspension hearing should ride upon the factual issue of an intoxicant's change of mood after the initial test offer. Again, we question the district court's tendency to expand the exceptional case to the general one as a predicate for constitutional rules.

IV. The Governmental Interest In The Deterrence And Removal Of Unsafe Drivers From The Highways Is Equally Strong Under Both The Massachusetts And Illinois Statutes.

The Massachusetts law serves the goals of both highway safety and administrative efficiency in its courts and motor vehicle Registry.

As a policy of safety, obviously the prospect of a prompt suspension, unavoidable through a prior hearing regime, encourages drivers to submit to the breathalyzer test. The test yields objective and usually conclusive evidence of the charge of intoxicated driving. The objectivity of the evidence is doubly valuable: it promotes the conviction of the guilty, and the exculpation of the innocent. Convictions, in turn, will build to a loss of license and removal from the roads of the habitual offender. Moreover, the implied consent system, confronting the potential offender with the prospect of a prompt suspension on the one hand, and a likely conviction on the other, carries its own deterrent value against drunken driving. Accurate dispositions, license sanctions, and general deterrence all turn on the driver's inability to parry and temporize against the suspension sanction through the medium of an automatic prior hearing system.

Obvious efficiencies also accrue to the government. It is relieved of the administrative burden of a hearing system likely to be employed by all drivers resisting the breatha-

lyzer. That number is likely to grow with the very awareness of such a prior hearing process. In addition, the full evidentiary character of such hearings will be appreciable. While the district court majority suggests that some quick opportunity for emergency relief followed by a more thorough hearing on the factual dispute over the test refusal would bring a constitutional cure,[10] the dissenting judge more realistically observes that little short of a full evidentiary exercise will resolve the typical dispute.[11] Further, the probative value of the test eliminates the burden of trial for both the innocent and the intoxicant facing an inevitable adjudication of guilt and therefore prone to plead accordingly. Finally, the state is spared the practices of delay, gamesmanship, influence and money launched against officers charged with enforcement of hearings against drivers bent on the preservation of their licenses.

The majority of the district court rejected the governmental interests, somewhat narrowly, with the observation that a compliant intoxicant retains his license by submission to the test. Thus they doubted the utility of the scheme for highway safety since the drunken driver could remain on the road in spite of the statute.[12] This rationale is hardly a comprehensive assessment of the law's usefulness. It neglects the values of conclusive evidence, deterrence, and conviction consequences discussed above. In particular, it mistakenly equates the postponement of a sanction with the total escape of punishment; for while a cooperative intoxicant preserves his license for the immediate interim, the test results set in motion his conviction and any accompanying license loss appropriate for the repeated offender.

[10] 438 F. Supp. 1157, 1159-1160 n. 2.
[11] 438 F. Supp. 1157, 1164 & n. 5.
[12] 438 F. Supp. 1157, 1161.

And conviction short of license loss may have its sobering effect, as the driver incurs punishment and moves closer to the license sanctions attending a further offense. The district court's selective focus on a short-run anomaly of the statute should not substitute for a thorough and balanced judgment of its service.

Conclusion.

Because the second opinion of the district court is a further misapplication of the decisions in *Mathews* v. *Eldridge* and *Dixon* v. *Love*, the Supreme Court should reverse summarily the judgment below or set the case down for argument.

Respectfully submitted,

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